No. 88-1125

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGESON, ET A.L.,
APPELLANTS

V.

MINNESOTA, ET A.L.
APPELLEES

PETITION FOR A WRIT OF CERTIOARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR STANLEY JOHN
AS AMICUS CURIAE SUPPORTING APPELLEES

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

Stanley John is employed by Focus on the Family, a Protestant educational group featuring Dr James Dobson. Focus on the Family broadcasts on many hundreds of stations daily. For six months, his arm has been in first a cast, then a sling because of an injury he suffered while being arrested at a rescue. He was not resisting in any way at any time when injured.

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SUMMARY OF ARGUMENT

Argentine judges can declare laws unconstitutional and Treaties of Argentina can affect Constitutional questions. This brief consists of one Argentine court opinion, cited not as authority, but for the research and logic therein. The opinion is relevant for the historical analysis and treaties cited. Initially, abortion history is analyzed in a manner not previously presented to this Court. Subsequently, more than a dozen treaties requiring the signatories to respect preborn human life in such a manner as to preclude the legalization of abortion are cited. The US has signed many of these treaties. Killing any innocent human life became unpopular for a while after the Nazis. Many treaties of the time promise no such killing. Time has flown as has the unpopularity.

Judicial Branch

of the Argentinian Government

Given in Buenos Aires, Argentina, on the 2nd. day of June, 1989.

CASE TO BE RULED UPON: Request by Nelida Victoria Vera—entered under Docket No. 28.991, Secretariat No. 156—which appears on pg. 85/B;

WHEREAS: I must undertake the study of this request for abortion taking into account the statement made by QUINTANO RIPOLLES (Tratado, Madrid, 1962, t, 1, 4-71): "The fundamental problematic that the subject of abortion and its unnumerable facets entail, ranging from the theological, medical and legal aspects, and encompassing the literary and sentimental, renders abortion into such a passionate topic, that no other penal law subject surpasses it... in polemic passion

and diversity of legislative treatment". Even though in the case at hand we are dealing with a concrete event with circumstances and peculiarities inherent therein, I cannot forgo the exposition of the historic evolution and the different criteria applied in all the different thesis in favor of and against abortion.

I. HISTORIC EVOLUTION: Since ancient times, legislative codes such as the Code of HAMMURABI, which preceded our times by seventeen centuries, fulminated abortion, assigning severe punishment to it, which reached even capital punishment in some cases. Abortion was also penalized by age-old Assyrian and Babylonian codes, with the peculiarity indicated by Niceto Blazquez ("El Aborto", Ed. BAC, Madrid, 1977), that the culprit had to suffer the punishment, "even if the fetus was

feminine". In each culture the voluntary interruption of pregnancy was reproved, as it was in the ancient Hebrew law, as well as within the dispositions of the Vedas and in the laws of Manu.

In the Greek culture, it is attributed to Solon and Licurgo to have ruled against abortion, and the exegesis of a forensic discourse by Lisias lead us to believe there were public judicial actions in existence in order to protect embryonic life. Suetonio, Seneca and Juvenal were prompt to stigmatize such aberrations of unenlightened humanity. Even Ovid wrote anathemas against abortive women in the light of the evils that their practices derived for humanity. Likewise, under the rule of emperors Severo and Anthony, women who would abort were condemned to "exile", labeled as "extraordinary criminals".

Lactancio's rule terms abortion as "an impiety—to place criminal hands upon the work of the Lord", translating and coalescing the guiding principle —henceforth inexorable— upon which Christianism would base its secular-postulate of respect for human life, which was later on enriched by the doctrinal contributions of St. Thomas Aquinus and St. Augustine. The ecclesiastical magisterium reached the definition of the intrinsic MALICIOUSNESS OF ABORTION, based upon the certainty of the existence of a new human being from the very moment of conception.

Hence we arrive to the reasoning of Ludovico Bender, a legal philosopher (Philosophiauris, Rome, 1947) who points out that from the point of conception, the new being—who already has HIS OR HER OWN

LIFE—experiences only an ACCIDENTAL evolution, but never any SUBSTANTIAL CHANGE. And this being will follow the course of its own evolution, tending towards an end which is not that of the mother, but HIS OR HER OWN END.

Likewise, Jean Rostand, Biology Nobel Prize, asserts: "There exists a human being from the fertilization of the ovule. THE HUMAN BEING IS ALREADY COMPLETE IN THE FERTILIZED OVULE. S/HE IS complete at that point, with all his/her potentialities... therefore, any abortion is, without any doubt a small assasination". (Word, No. 173, Madrid, January 1980).

The 'nasciturus' is a new individual, and, unless we denied him/her the definition of humanity and its inherent rights, we cannot act against him or her.

If we do so, we must be aware that we are acting as a judge who condemns to death a man, and that this man is INNOCENT; and that this judge—which would be us—condemns him in order to please another human being, or, in the best of cases, in order to save her life, her honor or her happiness. And this would be to return to the Nietzscheian philosophy of of the super man, and to justify, therefore, the Nazi concentration camps and gas chambers. (Cited in Blazquez' work, pg. 130).

The fundamental truth is, as Prof. Jerome LeJeune says, is: "...that WITH ABORTION A HUMAN BEING IS KILLED."

This is stated in several international agreements which reaffirm the right to LIFE, such as the San Jose de Costa Rica Pact (American Convention of Human Rights, Aug. 1, 1975), Article Four, Paragraph

One, which says: "Every person has a right to life, and this right shall be protected by law from the very moment of conception. No one can be deprived of his/her life arbitrarily".

Likewise, Article 19 (of the above-mentioned document) declares: "Every child has a right to the protective measures inherent to his condition of minor, which are the responsibility of the family, society and State".

As for the Declaration of the Rights of Children (United Nations, Oct. 20, 1959), it says: "The child needs protection and special care, which include proper legal protection, both BEFORE, as well as AFTER his/her birth.

Within these same lines and emphasis, there is a wealth of international documents that guarantee the life of those

persons who are in gestation, and even though this is not the time to comment upon them, I shall at least make mention of them:

- American Declaration of Rights and Duties of Man, approved at the IX International American Conference, Bogota, 1948, Article One.
- Universal Declaration of Human Rights, approved and proclaimed by the United Nations General Assembly on December 10, 1948, Article Three.
- Geneva Oath. This text is complementary, within the scope of medicine, to that of the Universal Declaration of Human Rights, (Geneva, 1948) and was prepared by the World Medical Association. The following year, 1949, the International Code of Medical Ethics was proclaimed. The World Medical

Association published other statements to this effect in 1957, 1964, 1968, 1970, 1973 and 1974, to which we must add the Treaties of Nuremberg, Tokio and Helsinsky; the various national medical onthology codes, and several manuscripts from the Red Cross International Committee.

- European Convention to Safeguard the Fundamental Rights and Freedoms of Man; Rome, Nov. 4, 1950, Art. One.

- Declaration of the Rights of the Child; United Nations General Assembly, Nov. 20, 1959; Preamble and Whereas.

- International Pact of Economic, Cultural and Social Rights, approved by the United Nations General Assembly on December 16, 1966, articles Sixth and Tenth.

- International Pact of Civil and

Political Rights, approved by the United Nations General Assembly on December 16, 1966; articles 6th and 24th.

- Final Act of the International Conference on Human Rights; Teheran, April 22 through May 13, 1968, United Nations, Title II, Article One, 2nd and 6th Paragraphs.

- American Convention on Human Rights; Pact of San Jose de Costa Rica, approved by the Conference of San Jose de Costa Rica on November 22, 1969, articles 4 and 19. OUR NATIONAL LAW No. 23.054 enacted on March 1st, 1984, ADHERED TO THE SAME (above) AND STATED OUR OBLIGATION TO FULFILL (said Pact) IN ITS ENTIRETY.

- Final Act of the Conference on Security and Cooperation in Europe, Helsinsky, August 1st, 1975, Title VII.

All of the above was incorporated unto

the different provincial constitutions in an explicit and mandatory manner.

II. Position of the Catholic Church

The Holy Catholic Church, in its declaration on abortion given by the Sacred Congregation for the Doctrine of the Faith through the words of the Pontifice Sumum on July 25, 1974, ratifyied, confirmed, and ordered said declaration to be printed.

In this declaration, the Church fixes its position on the subject as follows: "It cannot but cause perplexity to see how the indiscriminate protests against the death penalty and against all forms of war arise everywhere, and simultaneously grows also the reinvidication for liberalized abortion, be it entirely or within certain cases which become incessantly more

numerous. We can never invoke freedom of opinion in order to attempt against the rights of others, most especially not in regards to the right to life. It is not a question of opposing one opinion with another, but rather one of imparting a perennial teaching of the Supreme Magistrate, which exposes the norm of morality in the light of the faith."

The tradition of the Church has always declared that human life must be protected and favored from its very beginning as well as throughout the various stages of its development. Opposing the custom of the Greco-Roman world, the Church of the first centuries has insisted upon the gap that exists on this regard between said world and the Christian tradition. It is clearly stated in the DIDACHE: "YOU SHALL NOT KILL the fruit of the womb WITH

ABORTION and YOU SHALL NOT KILL the child who is already born."

Atenagoras notes that Christians consider women who take medicines to provoke abortion as homicidal, condemning those who kill their children—including those who are still living in the womb, "where they are no longer subject to the Divine Providence alone."

Tertulian affirms the same principle with clarity: "It is a premeditated homicide to impede birth, whether the life was taken upon birth, before or after. He is a man, the one who is in the process of becoming one".

Throughout History, the Fathers of the Church, its pastors and its doctors have taugh the same doctrine. The diverse opinions in regards to the precise moment in which the spiritual soul is infused

(within the body) have not created any doubts as to the illegitimacy of abortion.

Among many other documents, suffice it to remember just a few. The First Council of Maguncia, in the year of 847, reaffirms the penalties decreed against abortion and determines that strenuous penitence must be inflicted upon women who provoke the elimination of the fruit conceived in their womb".

The Decree of Graciano recalls the following words from Pope Stephen V: "To cause death through abortion of one who had been conceived constitutes a homicide". St. Thomas, extraordinary Doctor of the Church, teaches that abortion is a grave sin, contrary to natural law. During the Rennaissance, Pope Sixtus V condemns abortion with even greater severity. A century later,

INNOCENCE XI rejects the propositions of certain canonical laxists who pretended to dispense an abortion provoked before the time in which some placed the spiritual birth (animation) of the new being. In our days, the last roman pontifices have proclaimed the same doctrine with maximum clarity. Pope Pius XI has given an explicit answer to the most serious objections. Pius XII has distinctly excluded direct abortion, that is to say, one undertaken as a means or end. John XXIII reminded us of the Early Fathers in regards to the sacred nature of LIFE, which requires GOD'S creative action from its beginning.

More recently the Second Vatican Council, presided over by Paul VI, condemned ABORTION most severely: "Life must be safeguarded from conception

onwards with maximum care, and ABORTION and INFANTICIDE are abominable crimes." The same Paul VI, talking about this subject on several occasions, did not hesitate to repeat that these teachings of the Church "have not changed and are immutable".

The respect for human life is not something that is imposed upon Christians only. Reason alone suffices to demand it, based upon what a person is and must be.

THE FIRST RIGHT OF A HUMAN BEING IS HIS/HER LIFE. Every person has other rights, some of them are more precious than others; but that right is the fundamental one, upon which rest all other rights. This is why it must be protected more than any other right. It does not behoove any society nor any Public Authority, whichever one it might be, to

acknowledge this right for some and not for others: Any bias is iniquitous, be it based on race, sex, color or religion. It is not the recognition of it made by others what establishes this right; it is something intrinsic that exists before, demands to be recognized, and the rejection of which is absolutely unjust.

The right to life remains intact for an elderly person, reduced as his (mental) capacity might be; nor has a person with an incurable disease lost this right either. This right to life is no less legitimate in a child that has just been born than it is in a mature man. From the time of fertilization of the ovule, a new life is inaugurated—one that is not that of the father nor that of the mother, but rather that of a new human being that develops onto his/her own. S/he will

never be a human being is s/he is not already so at that time. He is a MAN, the one who is in the process of becoming one.

Both Divine Law and Natural Law therefore, exclude any right to kill an innocent man. The violation of moral values is always a greater evil for the common welfare than any other. A moral dilemma is almost everywhere accompanied by grave judicial debates. The law is not obligated to sanction everything, but it cannot go against another deeper law which is greater than any human law—the natural law instilled in man by the Creator Himself as a norm which reason struggles to descipher and formulate, recognizing that it must be better understood, but one which is always bad to contradict. Human law can rennounce to the punishment thereof, but cannot declare as honest that

which is contrary to the Natural Law, because any such contradiction renders such human law a negation of the law (a non-law). On the contrary, what pertains to the law is to procure a reform of society, of the conditions of life in all spheres, beginning with the less privileged ones, to ensure a dignified reception for every human creature that comes into this world. To come to the aid of families and single mothers; to guarantee recognition for natural children and the rational organization of the adoption system: A wholesome positive policy that must be promoted so that there shall always be a concrete, honorable alternative to abortion.

Hence the importance of citing the words of Hanz Welzer in his book Introduction to the Philosophy of the Law:

"...The science of jurisprudence must meditate again upon the millennial truth that there is a Justice higher than the Law, a natural justice, a Divine equity, a rational right, measured against which injustice continues to be injustice, clothed as it might be with the form of the law, and before which the verdict pronounced in accordance with this unjust law does not constitute justice, but the contrary of Justice".

III. DOCTRINE OF THE SUPREME COURT OF THE UNITED STATES ON ABORTION

Following the alignment of different opinions it is incumbent upon us to refer to the position upheld by the Supreme Court of the United States, even more so if we take into account the notorious change that is taking place in regards to

the principle introduced in 1973. That is to say, it is extremely important to observe a progressive eversion of the permissive notions on abortion in that country.

In 1965, the Northamerican (Supreme) Court wanders, in the subject of abortion, into a new axiological definition of privacy, which was afforded until then only for specific matters which were enumerated, such as documents, papers and other belongings. But from the verdict in GRISWOLD vs. CONNECTICUT, privacy became a fundamental right, protected and superseded only by a compulsive interest of the State.

In 1973, with the Roe vs. Wade case, the so-called "FREEDOM OF CHOICE" principle was introduced. That is to say, the freedom to opt for the interruption of

the pregnancy, which decision was based on the premise that it is always better to allow some individuals the right to make inconvenient decisions than it would be to deny to all the right to make decisions that would have a trascendental implication in their destinies.

In summary, I would like to point out the following contradictions:

a) In 1973 the Court allowed abortion based upon the right to privacy of the woman, but on the other hand, it limited—in 1983—the information to be given to a woman (prior to an abortion) about the dangers implicit in the violent interruption of pregnancy, on the basis that said information would pressure women, thereby impeding the fulfillment of their free choice.

b) In 1973 the Court recognized the

legitimate interest of the State in protecting the potential for human life, but in 1986 it argued that it is unconstitutional to provide information to the woman about possible alternatives to abortion.

c) Finally, in 1973 the Court recognized the "freedom of choice" to decide upon (continuing or not) the pregnancy, but then thirteen years later, and in the name of that very same freedom of option, the Court denies the possibility of receiving information that could result in the survival of the one that progresses towards birth in the maternal womb.

IV. THE RIGHT TO BE BORN

Leaving aside all the different positions and historic evolution of the various doctrines on abortion, the fact

remains that we must rest upon a solid foundation and a basic principle which is the defense of Human Rights. Within that scope, the first of the right is the right to Life, which begins—as it has been sufficiently proven scientifically—at the very moment of conception. Says Dr. Bernard Nathanson in his argumentation: "today, with the modern techniques available, we can treat many illnesses (while) in the womb, including some fifty different surgical operations... If the being conceived is a patient who can be treated, s/he is then a person, and if s/he is a person, then s/he has a right to Life and to our every effort to preserve said Life. The same specialist adds, "rape is surely a very painful situation. Fortunately, only very few cases of rape are followed by pregnancy. But even in

this case rape, which is a terrible act of violence, cannot be followed with another, no less terrible, such as the destruction of a live being. Therefore, to attempt to erase a horrible violence with another horrible one does not seem logical; it is simply absurd and what it really does, is to augment the trauma for the woman by destroying an innocent life.

In the same sense, Dr. Bidart Campos (El Derecho, 113-479), affirms that human life is a right of the one to whom it belongs. It is a subjective right of that person and intrauterine life is a judicial asset. If that life belongs to the being that lives in the maternal womb, it must be argued without any doubt, that this same being owns the right to enjoy the perusal of this asset which is his/her own—which is called LIFE. Therefore the

judicial realm cannot disassociate itself from any living human reality, because it (the judicial realm) is the product of man for men. To be born is not to commence living, but rather to go out into the external world, once the necessary development has been achieved. The creature precedes the birth. (Cifuentes Santos, The Law, 15-956).

V. BRIEF EXPOSITION ON THE INTERPRETATION OF NORMS

The zeal shown by some classics of jurisprudence to avoid the extension of the penal law propounded by some authors, made them affirm that interpretation of said (law) was not possible. Thus we find Beccaria, who maintains that... "neither can the authority to interpret penal laws rest upon criminal judges, for the same

reason that they are not legislators". (On Crimes and Penalties, Chapter IV, pg. 75, Spanish Edition, Aguilar, 1982).

Montesquieu opined within the same lines ("L'Esprit des Lois", book 6, chap. 3): "In the republican government, it pertains to the nature of the constitution for the judges to follow the letter of the law. There is no citizen against whom one can interpret a law..." All of these came from a false concept assigned to the word 'interpretation', inferring that it must necessarily be done "in malam partem"; the true meaning of interpretation of the law is to investigate "the adequate sense of a disposition with the purpose of its application in a real life case" (Metzger). It is not a question of searching in the law and discovering "extra legem" in it, but rather "intra

legem"; the goal is to use the antecedents and means available in order to understand the intention, the spirit of the law which lives autonomously within it. But let it be clear that the goal is not -properly speaking- to search for the will of the legislator, but rather the intention of the law itself, and in that sense, as it were taughtby August Finger ("Lehrbuch des Deutchen Strafrechts, Berlin, 1904, pg. 33): ..."the completed law becomes independent from its past..."

Thus, to interpret (the law) is an operation that consists of searching not just for any will that might be contained within that law, but rather for the true one. In the practical case at hand, the will of the subscriber is-distinct from that of the subject-a judicial interpretation for which I will make some

doctrinal observations before giving my strictly personal opinion.

VI. THE CASE AT HAND

The second paragraph of Article 86 in the Penal Code says, "...an abortion practiced by a certified physician with the consent of the pregnant woman is not punishable... (Second paragraph): if such pregnancy results from rape or an attempt against decorum played upon a demented or idiotic woman. In this case, consent of her legal representative must be obtained in order to perform the abortion."

If we limit ourselves to a grammatical interpretation, laws No. 17.577 and 21.388 assigned an exculpatory quality to an abortion practiced by a certified physician with the consent of the pregnant woman, if the pregnancy resulted from a

rape upon which penal action had been initiated. The eloquence of the wording in the norm I comment upon invalidates any other analysis.

The question is: Is the abortion practiced by a certified physician with the consent of the woman punishable, if the pregnancy evolved from a rape? Or must the woman also be idiotic or demented?

Therefore, in order to interpret what the law says, we must necessarily adhere to the fundamentals that inspired our legislators to write said norm. The two hypotheses of non-punishable abortion were introduced by the Senate Commission. From the terms on which the initiative of the (Senate's) report was based, we are here concerned with the following: "the second case (referring to paragraph 2) entails a

true innovation in criminal legislation. A distinguished professor of Penal Law who was quoted several times on this report, says that the last version of the Swiss Penal Code's project of law (upon which was based the law under discussion) is extremely interesting, for it introduced a nuance that did not exist in any of the previous versions. This new version was introduced by the second commission of experts." "It is the first time -he adds- that a legislation dares legalize abortion with an eugenic purpose, to impede the birth of an abnormal or degenerated being from an idiotic or demented woman, or as a consequence of incest. Commenting on this article, Gautier points out that in the case of incest one could add considerations of ethnical order, and that when the pregnancy is the result of an

attempt committed without violence, against a woman who is idiotic, demented, unconscious or otherwise incapable of resisting, the interest of the race could be argued, even more justly so than in the case of incest. What good can come from a demented or cretin woman? It is undeniable that the law must authorize abortion when it is practiced with the intervention of a physician for the purposes of perfecting the race. The dilemma was presented in Europe during the last war in regards to the rapes perpetrated upon numerous Belgian women by drunken, reckless or criminal soldiers."

No purpose other than legislating eugenic abortion comes to light from reading the abovementioned report.

However, asks Fontan Balestra, is this to justify only the so-called eugenic

abortion due to the fact that this particular pregnancy came about as a consequence of copulation with an idiotic or demented woman—or is it also foreseen for the sentimental abortion that destroys the fruit of <u>any rape</u>? The question arises from our wording —currently in force— that says, I repeat, "...If the pregnancy results from a rape or an attempt against the decorum of an idiotic or demented woman..."

Obviously, if the legislator would have purposed to justify only the case of rape on a demented or idiotic woman, it would have sufficed for him to say: "if the pregnancy results from a rape committed upon an idiotic or demented woman" or —so as to keep in harmony with the legal terminology— he could have said, woman "deprived of reason". With this or any

other equally simple wording the law would have been made clear and the thought complete. It has been indicated that this could not have escaped the legislators, no matter how precipituously they may have proceeded, because the mere reading of this paragraph made it clear that—such as it was written—they were talking about two very different things: rape and attempt against decorum. This cannot be construed in any other way; it is understood that the legislators wanted to say something when they made express mention of what they themselves termed 'attempt against decorum'. We must consider that as Reco maintains, the attempt against decorum CANNOT give place to the conception of any child unless there has been copulation. But it just so happens that the wording of the paragraph does not have a comma

between the words "rape" and "attempt against decorum"; hence the unavoidable confusion.

All of these confusions have a clear cause. The Senate Committee takes this article from the French Commission in the Swiss project of law in which "Schandung" is translated as "attentat a la pudeur d'une femme idiote, alinee/inconsciente ou incapable de resistance" (attempt against the decorum of a woman who is idiotic, deprived/unconscious or incapable of resistance).

Truly, that is, in the technical sense, the definition of "schandung". In German law, after which the Swiss project of law was patterned in this case, (as opposed to our article 119 which designates all three cases enunciated with the word "rape") there are different technical terms used

for forced rape as opposed to the crime termed "schandung". Here the word is used more in the sense of a profanation, rather than as an attempt against decorum. Hence, the misinterpretation has two causes: the fact that the word rape has a generic acceptance in our legislation and the fact that a translation accepted into the text of the law, is correct but becomes equivocal upon being incorporated to our code in regards to the expression 'dishonest abuse'. As Soler summarizes, in order to understand this disposition, it becomes necessary to affirm that in this case the law termed as "attempt against decorum" the rape foreseen in the second paragraph of Article 119. Consequently, the impunity sanctioned in Article 86 reaches any case of rape, and not just that of the idiotic or demented

woman (Treatise, Vol. III, pg. 113).

Let it be clearly established then, that in Argentina an abortion practiced by a certified physician with consent of the woman is not punishable if the pregnancy arises from a rape. This declaration, totally in line with the norm currently in force in our country, shall be subject, on the part of the undersigned, to posterior analysis inasmuch as to what must be done with a norm which is in flagrant violation of the National Constitution, is against the precepts of public order peacefully adhered to by all the civilized countries of the world, and is against the spirit of our law in general. A norm, therefore, which stands at present in full force, against the values consecrated by the judicial bodies previously mentioned.

VII. PERSONAL OBJECTIVE AND SUBJECTIVE CONSIDERATIONS

Salvaged my opinion, enriched with several other authorized assertions already summarized herein, I shall refer to two other aspects of the matter which merit independent attention within the context of this pronouncement, due to the crude reality that both reveal.

a) The first one is a commentary on the painful situation brought before me in regards to what said situation represents for the undersigned from the viewpoint of the victim. This I can observe from two vantage points. 1) As a man I must make clear —without any reservations— that I am in full solidarity with the the victim in the anguish she is living right now. She did not choose to go through this difficult situation, and I must question

the physical relief that society's responses might be able to bring —from today on, and as long as they are needed— to this afflicted woman. I use this qualification because I have arrived to that conclusion after having made contact with her on several occasions. I tell her also, that she will not be burdened with the obligation to take care of and educate her child once he is born, if she does not wish to do so, since there are on record, at the time of this pronouncement, three formal requests for adoption, which shall be channeled through the proper procedural course in that eventuality. 2) As a judge, I can tell her that I have done everything within my reach; I have individualized the alledged perpetrators of the act that victimizes her, who remain detained, and against whom there is a

preliminary writ of -imprison-ment firmly in order for the crimes of rape, threats and illegal deprivation of freedom. It is therefore, my most deeply felt wish that someday, something or somebody might —within the limits of the law— return to the petitioner her physical and spiritual health, the vulnerability of which is made manifest in answers such as the one she gave when asked whether she would give her consent to submit herself to extraction of a sample of the amniotic liquid (clarifying for her that this represented a risk to her life): "...anything as long as they take out this filthiness I've got inside".

b) The second aspect that merits our attention, which was previously highlighted, is the degree of certainty inasmuch as the paternity of the fetus,

authorization for whose destruction was requested of the undersigned.

Obviously the rape of which the victim was the object has been accredited on record. Furthermore, we have individualized prima fascie the author of this deed, as well as a conspirator, and have regularized their due process. Now, none of this confirms in an unequivocal manner that Defendant Alanis is the father of the child whose existence has been determined in the body of the victim. The object of legal investigation to be established in regards to the petition presented by the Plaintiff is whether the Defendant is the father of the 'nasciturus' or not.

Otherwise, and within this same realm, it is to be noted that I do not question the victim's statements as to her not

having had sexual relations either before or after the event pertinent to the case, which could allot the paternity upon any third parties. However, this is only a presumption based upon the personal image I have of the victim, for there is nothing on record that may prove this point; neither is it my prerrogative to inflict upon the privacy of this young lady any further. Within this area, I must point out that even if paternity had been established through scientific methods, [to pursue this course of action] would entail an infringement upon the defensive rights of the detained; for undoubtedly, his denial to consent to the killing of his son presuppose simply and clearly the [implicit] recognition of the deed of which he is accused, which is in violation of express constitutional guarantees

(Article 18).

VIII. THE LAW DECLARES THIS ABORTION AS AN EXCULPATORY CAUSE

The basis for this determination in within the law itself, but in order to expound it I shall renounce as much as possible, to any judicial technical inference that shall render difficult the understanding of what in essence is the core of the matter brought before the undersigned. This is so because the direct recipient of the judicial implications of this pronouncement is the victim, whose understanding of the law is null, but for whom I have the responsibility of explaining to her, as clearly as is possible, why she "will not be able to take out that filthiness that she has inside" as she herself—clearly and crudely—expressed to me in one of the

interrogatories to which she was subjected.

The victim has been violated, and has become pregnant as a consequence of said violation. If she were to abort in this moment giving her consent thereto to a certified physician, this typically illegal act would not constitute a crime. This is so because the law foresees such act as an exculpatory cause. What does this mean? Well... When an act has been committed which has both subjective as well as objective characteristics of a crime—as is the case of an abortion—the law forsees a disposition by which this act which would normally be considered a crime, in this special case does not merit any penalty for the one committing it. That is the effect of an absolutorial excuse, as defined by Gimenez de Asna (The

Law and the Crime, pg. 433): "...it pertains to situations in which the law, generally due to reasons of usefulness and criminal policy, considers preferable to do away with the penalty for extremely special reasons..."

But from all that has been expounded here a truth is inferred, ever so clear, that once enunciated it shall override any other commentary: In order for this legal premise to function, first the act must be committed. To request an authorization such as the one contained in pg. 85, is to invert the logical order of things; is to distort so much the true spirit of the law —were I to grant the petition— that my decision would be, besides arbitrary, <u>delictive</u>, because I would be ordering death for an INNOCENT HUMAN being, without previous due process, without access to

defense, without the presence of any crime that might justify it, and without the prerrogative of capital punishment even exist in our legislation, etc.

In other words: We find absolutory excuses in the Penal Code—besides this article—on art. 132, or in art. 185 of the abovementioned legal body; the latter establishes, among other things, that "...they are exent from penal responsibility... for the larceny... which might be reciprocally caused: 1st. paragraph: the spouses..."

Now, no one could construe that a man or a woman would come before a judge to request authorization to steal something from their spouse; first s/he steals it, and then, on a subsequent day, should s/he be the object of a criminal investigation which might incriminate him/her, s/he

shall oppose this absolutory excuse as a defense, which, if pertinent, shall render his/her actions without penal responsibility. Here we have the same thing; if it is the wish of the petitioner to abort, let her do so. But what no one can pretend, under any concept, is to substitute beforehand for his/her penal responsibility, delegating the same upon the judge. Because in that case, then he (the judge) would be the true criminal of this story. It is not the prerrogative of the undersigned, nor that of any earthly magistrate or judge to order that an innocent person be killed, because that is what it would be. Furthermore, it does not perspire from the norm that I have been analyzing in depth for some pages now—not even through interpretative means—that I must authorize the abortion

because in so doing, even if I were to partake of the faculty that the norm under analysis imparts—to which I AM FIERCELY OPPOSED—I would be denaturing the judicial function that this (rule) represents, which is: to discount the penalty afforded to someone who has committed an act described objectively as a crime.

To end, I would like—if this is possible, and I hope it is—that someday the damnified victim herein would feel the pride that no doubt I would feel tomorrow when this person is born and can decide for his/her own what to do with his/her life and thereby address his/her actions.

IX. THE UNCONSTITUTIONALITY OF THE NORM

I must say that in the case at hand, I have assigned Dr. Lopez Lecube, Official Defender No. 5 of the Federal Capital, as

the representative for the rights of the fetus. Dr. Lopez Lecube has requested from the undersigned to declare the inconstitutionality of paragraph 2 in Article 86 of the Penal Code. Our control system for constitutionality in the federal jurisdiction is difused jurisdictionally. Therefore, it befalls sufficiently within the competence of any of the magistrates therein.

All requirements demanded by our constitutional system of law are fulfilled; there is a suit or legal proceeding in which verdict must be rendered. There is a norm which is in effect and is applicable to said legal proceeding, which I am asked to declare unconstitutional upon request by party therein, also a requisite of the law.

I have said above that I do not partake

of the faculty given by the judicial norm under analysis, and that is so because it is of the utmost priority to understand that our constitution grants the right to life—Article 33; the spirit of our Penal Code is contrary to the possibility of abortion; abortion is a crime that attacks life; the judicial asset being protected is therefore, <u>life itself</u>. I ask: Where is the judicial philosophy principle upon which the right to life could be broken when this (life) is a product of rape, or of an "attempt against decorum" performed on an idiotic or demented woman?

Changing the approach, which is the judicial asset afforded protection by the second paragraph of Article 86, that it might so successfully preempty the <u>value of life</u>, so clearly protected by our Constitution and our Penal Code? Is it

perhaps the perfection of the race—because to this end pointed the Swiss legislators, and obviously did so with most peculiar reasons already commented upon, reasons which do not apply to our reality.

This being so, there is no answer to this interrogant and we must strive then to avoid the situation in which the maternal womb might become the most dangerous place for an Argentinian to be in. Besides, the capital punishment has been excluded from our legislation. Upon what bases then, can this principle (the one of capital punishment) be incorporated for the unborn persons ... is it perhaps because they cannot defend themselves?

There is no veritable statistic that would demonstrate that all children—or at least the majority therein—resulting from incestuous copulation are degenerate, or

that those that result from fertilization of an idiotic or demented woman shall necessarily be the same as their mothers.

Therefore, I insist, there is no basis whatsoever for allowing the fall of the right to life, which is so comfortably and peaceably installed in our legislation, due to —in short— a poor copy of a foreign legislation. Consequently, the rule currently in force is, in the opinion of the undersigned, <u>UNCONSTITUTIONAL</u>, and must be declared as such.

WHEREAS, taking into account all that has been expounded upon herein, and without prejudice of the civil rights or actions that the petitioner might otherwise exercise through the pertinent means or channels, the undersigned

RULES AS FOLLOWS:

I) TO DECLARE THE RIGHT TO LIFE WHICH IS THE PROPERTY OF EVERY UNBORN PERSON.

II) NOT TO HONOR THE REQUEST TO END THE HUMAN LIFE ENGENDERED IN THE WOMB OF THE PETITIONER.

III) TO DECLARE THE UNCONSTITUTIONALITY OF PARAGRAPH 2, ARTICLE 86 OF THE ARGENTINIAN PENAL CODE.

REMIGIO GONZALEZ MORENO. TRIAL JUDGE

CONCLUSION

In abortion cases, this Court should consider the treaties cited herein.

Respectfully submitted,

ROBERT L SASSONE, Attorney for Amicus

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Translated by Leda Diaz Freire, accredited by A.T.A. (American Translators Association) and edited by James A. Miller. Human Life International, September 25, 1989.

NO 88-1125
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JANE HODGSON, MD, ET AL.
Petitioners,
v.
THE STATE OF MINNESOTA, ET AL.
Respondents,

Affidavit of mailing of amicus brief copies, Rule 28.2
State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:
Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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Subscribed and sworn to before me on October 11, 1989.

Lawrence D. Sassone, Notary Public